

LATEST PROPOSALS FOR AMENDMENT OF EXPROPRIATION BILL

Background

The Expropriation Bill is now at a very critical stage in its enactment. The Portfolio Committee on Public Works and Infrastructure have deliberated on the submissions made during public hearings, the views of state and parliamentary legal advisors have been sought and canvassed and the committee has gone through the Bill clause by clause. Advocate Geoff Budlender (SC), who previously provided legal opinion on certain aspects of the Bill, has been requested to also respond to concerns raised by members of the committee during the clause-by-clause deliberations.

Clauses raised during deliberations and proposals for amendment

The following definitions and clauses of concern were dealt with in the memorandum by Advocate Budlender and discussed in the portfolio committee meeting held on 19 April 2022:

- A concern was raised as to whether section 25(2)(b) of the Constitution means that an expropriating authority may decide the amount of compensation. The memorandum states that a court may set the amount and timing and manner of payment by deciding or approving it. Approval necessarily implies that the court is presented with a proposal, that it finds compatible with justice and equity. To decide means something different. Section 25(2)(b) of the Constitution can only mean that only a court may decide the amount of compensation and the timing and manner of its payment if those affected do not agree on those matters with an expropriating authority.
- Definition of “court”: There were questions regarding the proposed Land Court and also the jurisdiction of the magistrate's court. The recommendation was that the definition be amended to read “*the High Court and a court of similar status*” to include the Land Court, once that gets enacted. It was clarified that a magistrate’s court would only have jurisdiction if the amount of money in dispute falls within the monetary jurisdiction of that court.
- Definition of “expropriation”: The memorandum by Advocate Budlender provides as follows with regard to the definition of expropriation and expropriating authority”:

“The definition of ‘expropriation’ was based on the Constitutional Court’s (‘CC’s’) judgment in *AgriSA*:¹

¹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

“expropriation” means the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority, and “expropriate” has a corresponding meaning’.

However, the definition does not cater for transfers of property to third-party beneficiaries of land, water and related reform, which section 25(8) of the Constitution expressly mentions. The Bill would inadvertently not afford the procedural and substantive protections to persons whose property is taken for land, water and related reform and given to third parties *without first becoming the property of the state*. In other words, it does not apply where there is a direct transfer of property to third parties in the public interest. This is clearly an error. Transfers of that kind are no less expropriatory than acquisitions of property by the state itself for a public purpose or in the public interest. And persons who have been deprived of their property accordingly should receive the constitutional guarantee of just and equitable compensation.”

The proposed new definition reads as follows: *“means the compulsory acquisition of property by an expropriating authority or a third-party beneficiary for a public purpose or in the public interest’.*

In addition, a new subclause to the clause dealing with the application of the Act is suggested that will read: *“The provisions of this Act apply to the compulsory acquisition of property directly or indirectly by third party beneficiaries in the public interest through an expropriating authority, including as contemplated in sections 25(4) to (8) of the Constitution.’* This is a positive development and will go some way in addressing the concerns raised by Agbiz and other organisations regarding the definition of expropriation. The focus is however still on acquisition rather than on the loss of property suffered by the expropriation, which is in essence what must be compensated for. It also still leaves open the possibility of regulatory takings or restrictions on property rights that will not be compensated for. Advocate Budlender was asked at the portfolio committee meeting whether compensation for constructive expropriation was a possibility in terms of South African law. He responded that it was not known yet whether constructive expropriation was part of the law in South Africa as there have not been any such cases before our Constitutional Court. Such cases would in all likelihood come before our courts in future.

- There were also concerns raised about a property that gets expropriated but is not used for the purpose for which it was expropriated. The memorandum expressed the view that if a property is not used for the purpose for which it was expropriated, and not intended to be used for that purpose, the justification for the expropriation will fail. It also recommended that: “In our view, the expropriating authority should obtain the consent of the expropriatee for a change of purpose, if the expropriatee does not wish to reclaim

the property. There should, however, be a statutory period after which a change of use or purpose will not require the expropriatee's consent or trigger a right to reacquire the property. A period of 10 years might be considered." A whole new clause dealing with a change in the purpose of expropriation is proposed in the memorandum.

- **Clauses concerning mortgages:** The memorandum is clear on the fact that a mortgage, which is a limited real right in property, is constitutional property. It goes on to explain that: "(When) the owner loses the property upon expropriation, the lender loses its security. This amounts to a deprivation of constitutional property. But the expropriating authority cannot acquire a mortgage by expropriation." The conclusion that Adv Budlender comes to is, that unless the Bill provides expressly for mortgagees at the various stages of the expropriation process, they will inadvertently be excluded in a way that adversely impacts their rights. The recommendation is that mortgagees should be involved during all the phases of expropriation.

Next steps

The portfolio committee still has to adopt the report on the Bill. The committee staff was still working and taking into account all the recommendations that had been raised by Adv Budlender. The committee was also still going to get the views of the State Law Advisor. It remains to be seen which of the proposals in the memorandum by Advocate Budlender will be taken on board and included in the amended version of the Bill. The committee will vote on the final version of the Bill, whereafter it will go to the House for the first reading debate and vote.

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